

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 547
5397831**

BETWEEN SARAH WHITE
Applicant

AND CAFÉ NIKAU LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Stan Austin, Advocate for Applicant
Murray Hutchins & Craig Dempster for
Respondent

Investigation Meeting: 5 November 2013 at Whakatane

Submissions received: 15 November from Applicant and from
Respondent

Determination: 28 November 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Sarah White, claims that she was unjustifiably disadvantaged by the reduction of her weekly working hours during July, August and September 2012 by the Respondent, Café Nikau Limited (the Café).

[2] Ms White further claims that she was unjustifiably dismissed on 23 September 2012.

[3] Mr Hutchins and Mr Dempster, Directors of the Café, confirm that Ms White's hours were reduced during several weeks in July, August and September 2012, but deny that Ms White was unjustifiably disadvantaged on the basis that she had been consulted about the reduction, and had been offered additional hours on days she did not normally work, however she had chosen not to work on these days.

[4] Mr Hutchins and Mr Dempster deny that Ms White was unjustifiably dismissed and claim that she was justifiably dismissed by way of redundancy.

Issues

[5] The issues for determination are whether Ms White was unjustifiably:

- disadvantaged by a reduction in her weekly working hours during July, August and September 2012
- dismissed on 23 September 2012.

Background Facts

[6] The Café was based in Opotiki and operated as a day-time café and night-time restaurant, although due to business fluctuations in respect of customer demand the night-time restaurant service did not operate from time to time.

[7] Ms White commenced employment at the Café on or about 18 March 2010 after having previously worked for Mr Hutchins and Mr Dempster at another business.

[8] Ms White, who worked as a chef at the Café and also carried out front of house duties as and when required, said there had been no written employment agreement between her and the Café, but her agreed terms included an hourly pay rate of \$20.00 and weekly hours of approximately 20 worked on Tuesday, Thursday and Sunday each week.

[9] Ms White said that at the commencement of her employment she had worked mainly at night which she had preferred, however at times when the restaurant service did not operate, she worked solely during the day.

[10] Initially she had enjoyed a very good relationship with Mr Hutchins and Mr Dempster; however she considered this had changed when Ms Sharon Reid commenced employment at the Café in April 2012.

[11] Ms White said she believed that from her date of commencement, Ms Reid had been allocated hours which had previously been allocated to her, and that she had been excluded from the close relationships she had previously enjoyed with Mr Hutchins and Mr Dempster.

[12] Mr Hutchins and Mr Dempster denied that Ms Reid had been allocated any hours previously allocated to Ms White, or that their relationship with Ms White had been adversely affected by the appointment of Ms Reid .

[13] Ms Reid stated that she had not been allocated hours previously assigned to Ms White and explained that she had initially been employed on a casual basis in April 2012 because Ms Leah Mokokoko, a cook at the Café, had been on leave. During May 2012 when she had not been allocated any work, she had been re-engaged to work on Saturdays only, a day Ms White did not normally work, and to cover any shifts which other employees were not able to work.

[14] Ms Reid said that she had worked as a front of house employee and that predominantly she had worked alongside Ms White who would be working undertaking the chef duties in the kitchen.

Reduction in Hours

[15] Ms White said that the night time restaurant service had operated during May 2012, however by July 2012 only the day-time café service had been operating and her hours had reduced below 20 hours per week.

[16] Mr Hutchins explained that as a result of the Café's adverse financial position he had obtained alternative employment in Auckland, which commenced on 2 July 2012.

[17] Mr Dempster said that as a result of the reduced trading hours on or about the beginning of July and the adverse financial trading position of the Café which had necessitated Mr Hutchins obtaining employment in Auckland, the hours of the other employees had been impacted and he had consulted with them about their working hours.

[18] Ms Leah Mokokoko who had worked as a day-time cook at the Café since March 2010 agreed that the employees had been consulted about their working hours at the time Mr Hutchins commenced his employment in Auckland.

[19] Mr Dempster said he had not considered it appropriate to reallocate to Ms White the regular day-time hours worked by Ms Mokokoko; however from July 2012 he had offered Ms White 17 hours per week to be worked on Thursday, Saturday and Sunday each week.

[20] Ms White said she had agreed to work on a Thursday but had refused to work on both a Saturday and a Sunday, although she had initially agreed to work one or two Saturdays when requested to do so by Ms Mokokoko.

[21] Ms Mokokoko said that as Ms White had refused to work on a Saturday, she had been asked by Mr Dempster to do so instead. However because she had not wanted to work on a Saturday either, she had spoken to Ms White who had agreed to work alternate

Saturdays, but as Ms White had constantly asked her to cover the Saturday shift, this resulted in her working virtually every Saturday.

[22] Ms Mokokoko said she had also asked Ms White to cover other shifts for her, but she had invariably turned down the requests.

[23] On or about 7 August 2013 Ms White had obtained additional employment, initially working 3 hours a day on 2 days at the Parahiki Childcare Centre, which had later increased to 4 days a week.

[24] Mr Dempster said that although Ms White had worked Thursdays during July, she had turned down the Thursday shifts offered during August 2012 on the basis of difficulties with child care arrangements, and had informed him on 9 August 2012 that she would not be able to commit to working on a Thursday, so as a result he had approached Ms Reid who had agreed to work a Thursday shift.

[25] Ms White said she had told Mr Dempster that she could not live on the pay associated with the reduced hours which she had been working, and he had suggested that she use annual leave to 'top up' her earnings.

[26] Mr Dempster said that at no time during the course of her employment at the Café had Ms White raised, either with him or with Mr Hutchins, the fact that she had been concerned at the decrease in her hours, and he did not recall her having told him that she could not live on the pay she had been earning as a result of the decrease in her working hours.

[27] Mr Dempster agreed that as Ms White had accumulated a significant amount of annual leave entitlement, he had discussed with her the possibility of her using some of it to avoid the Café having to pay out a large lump sum payment at the end of her employment. Ms White had agreed to the suggestion, and further suggested that she use some of the entitlement during July and August 2012, which had been agreed.

[28] Mr Dempster said that on Sunday 5 and Sunday 26 August 2012 he and Mr Dempster had discussed with Ms White the possibility of the Café opening for restaurant service on two nights a week as a result of customer demand which would help to ease the Café's financial problems; however on both occasions Ms White had refused to work evenings.

[29] Mr Dempster said that he and Mr Hutchins had not been aware that Ms White had obtained employment at the Parahiki Childcare Centre until a customer had mentioned it to them at the end of August 2013.

Notification of Café closure

[30] Mr Hutchins said that the Café premises had been occupied under the terms of a lease which was due to expire on 30 September 2012 with a right of renewal for a further two years. As the Café had been struggling financially with little surplus money to pay himself and Mr Dempster, Mr Hutchins said they had decided not to exercise their option to renew the lease for a further two year period following 30 September 2012.

[31] Mr Dempster said that their preferred option was to sell the business and chattels to a new employer who would offer all the Café employees ongoing employment. Accordingly they had advised all the employees about the situation and their preferred option.

[32] Ms Mokokoko confirmed that she had known from an early stage that the Café business was for sale as Mr Dempster and Mr Hutchins kept the employees well advised.

[33] Ms Reid also confirmed that all the Café employees had been advised individually of the situation, and that the situation had been discussed openly on many occasions thereafter.

[34] Mr Hutchins said that as he worked in Auckland Monday to Friday, he had normally returned to Opotiki and worked at the Café at the weekend. On Saturday 23 July 2012 Mr Hutchins and Mr Dempster had written and personally given a letter to all the employees including Ms White, who confirmed at the Investigation Meeting that she had seen and read the letter.

[35] . The letter stated:

To all Staff

As you are aware the café will be sold or close by 31 August 2012.

Therefore all staff positions will be made redundant from this date and this letter is deemed to provide the necessary three weeks (sic) notice period.

We thank you for your service and are happy for our names to be used as referee should you apply for new opportunities.

[36] Ms White said that following the letter dated 23 July 2013 she had received no further information about what had been happening in respect of the closure of the Café, despite frequently asking for information.

[37] Mr Hutchins and Mr Dempster said that they had kept all the employees verbally informed about what had been happening in respect of the closure of the Café, including the change from the date of closure of 31 August 2012, as indicated in the letter of 23 July 2012, to 30 September 2012.

[38] Mr Dempster said that during a meeting on 26 August 2012 Ms White had been informed that the Café would be kept operational until 30 September 2012 when the lease expired.

[39] Ms Reid confirmed that following the initial information about the proposed closure given at the end of July 2012 there were many subsequent discussions about what had been occurring in connection with the closure.

[40] Ms Mokokoko also confirmed that she had been kept regularly updated by Mr Hutchins and Mr Dempster on progress as regards the future of the Café and the possible closure and consequent redundancy affecting all the employees. In addition she had at various times asked about progress and had always had a response to her queries.

[41] Ms Mokokoko also said that she had known that the closure date of the Café had moved to 30 September 2012 because Mr Dempster had told her.

[42] Mr Dempster said that on 2 September 2012 he had a meeting with some prospective purchasers who had been interested in operating a business from the Café premises; however they had informed him that they had not wanted to employ any of the existing Café employees.

[43] Mr Dempster had spoken to Ms White and Ms Reid who had been working in the Café at that time, and said he had terminated the negotiations because he had only wanted to sell to a buyer who would retain the Café employees.

[44] Ms Reid said that she had responded: "*Don't worry about us you sell to them*", and Ms White had responded: "*Don't worry about me because we are moving to Napier as soon as both our houses sell*". It was mainly as a result of these responses that Mr Dempster decided to sell the chattels to those prospective purchasers.

[45] Following this conversation Ms Reid said that they had proceeded to discuss the situation as regards the Café closure and that she had been aware from this and subsequent discussions that her employment would end when the Café closed at the lease expiry date on 30 September 2012.

[46] Ms Mokokoko said that as all the employees had been informed at the end of July that the closure date of the Café had changed to the end of September 2012, she had started to look for alternative employment, and obtained new employment commencing on 1 October 2012.

[47] Mr Dempster said that on 20 September 2012 he had telephoned Ms White and confirmed that Sunday 23 September 2012 would be her last shift, and that during that telephone call she had told him that it was 'great news' and that she had been 'very happy for you'.

[48] At 9.01 p.m. that evening Ms White sent an email to Mr Austin in which she had written:

I had a phone call from Craig Dempster this afternoon at around 4.00ish telling me that the business was finishing up on the 28TH of September, next Friday. He was unsure of if it had finally sold but told me as Leah was starting her new job on the Monday, the 1st October they were closing up. So my last shift is this Sunday, not much warning eh, so glad I did find myself a new job after all.

[49] Mr Dempster said he had been shocked to receive a letter from Mr Austin the following day, Friday 21 September 2012, in which Mr Austin set out that Ms White was raising a personal grievance in respect of disadvantage arising from the reduction in her hours.

[50] Mr Dempster said he had been very upset to receive such a letter as he had no idea that Ms White had been upset about the reduction in her hours, and said that if she had raised the issue with him, he would have tried to resolve it. He also confirmed that despite having offered Ms White many other shifts, she had consistently turned them down.

[51] Ms Reid said she had been present when Mr Dempster had read the letter from Mr Austin and said that he had been very upset as a result.

[52] Mr Dempster said that he had telephoned Mr Austin because he had wanted to resolve the matter; however Mr Austin's response had been to demand a financial payment on behalf of Ms White.

[53] Mr Dempster said that worry about the financial situation of the Café and the resulting outstanding unpaid bills, and the raising of the personal grievance by Ms White had all contributed to making him feel stressed and unwell. As a result he had decided that he would be unable to work at the Café on 23 September 2012.

[54] Mr Dempster said he had telephoned Ms White's home telephone several times to inform her that the Café would not be open on 23 September 2012, however there had been no answer and as she had no message service, he had been unable to leave a message.

[55] Mr Dempster said he had also called Ms White on her mobile telephone number and had left her a message about the Café closure. As 23 September 2012, was to be Ms White's last shift at the Café, he also said on the message that Ms Reid, who had offered to call at Ms White's home on her way home, would collect the Café keys held by Ms White.

[56] Ms Reid confirmed that she had offered to visit Ms White at her home on 22 September 2012 and tell her that the Café would not be opening the next day, 23 September 2012. However when she called at Ms White's home she had been unable to get an answer, and although she called around to Ms White's home a couple of times more, there had been no answer.

[57] Ms White said that she had not immediately received the message left on her mobile telephone because it had been left on an old mobile telephone that she had not been using for a month, although she had become aware of it "*some weeks later*" when she had checked that telephone.

[58] On Sunday 23 September 2012 when she had attended the Café to work her shift Ms White said she had discovered a note pinned on the locked door stating that the Café was closed. Mr Dempster confirmed that the note had been left to inform Patrons that the Café was closed and would not be reopening.

[59] Ms White said she had learnt subsequently through gossip that the Café had closed and would not reopen, and this had been confirmed in her view when Ms Reid had called at her home to collect the Café keys.

[60] Ms White said that this had been the first time she had known that the Café would be closing at the end of September 2012.

[61] Ms Reid said that when she had gone to Ms White's home the following day, Ms White had had the Café keys available and ready to give to her, which she believed meant she had received the mobile telephone message from Mr Dempster.

[62] Mr Dempster confirmed that Ms White had been paid in respect of the shift which she had not worked on 23 September 2012.

[63] On 5 July 2013 a Statement of Problem had been filed with the Authority claiming Ms White had been unjustifiably dismissed and unjustifiably disadvantaged by the reduction in her hours. The parties subsequently attended mediation; however this did not resolve the issues between the parties.

Determination

Was Ms White unjustifiably disadvantaged by a reduction in her weekly working hours during July, August and September 2012?

[64] Ms White is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[65] The elements of s103 (1) (b) are:

- a. An unjustifiable action by the employer
- b. which affected the employee's employment or 1 or more conditions of employment, and
- c. this was to the employee's disadvantage.

An unjustifiable action

[66] Ms White is claiming that Mr Hutchins and Mr Dempster unjustifiably reduced her hours of work during July, August and September 2012.

[67] Mr Hutchins and Mr Dempster accept that Ms White's hours did reduce during July, August and September 2012, predominantly as a result of the night-time restaurant not operating in the evenings during that period.

[68] Ms White had worked for the Café from March 2010 and it is clearly established from the evidence that her weekly working times had fluctuated throughout her employment at the Café depending on whether the night-time restaurant had operated in the evening or not.

[69] There is no evidence that Ms White had objected during the period of her employment to her working hours varying in this way, and the issue is therefore whether the reduction in the hours and the days on which they were available to be worked by Ms White as opposed to the times when they were not available to be worked.

[70] The Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) addresses the question of whether or not an action was justifiable or is unjustifiable and states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[71] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

[72] I find that the undisputed evidence is that the reduction in Ms White's hours had been occasioned by the adverse trading position of the Café, including it having to cease to operate the night-time restaurant service during July 2012 due to low customer demand.

[73] I determine that the reduction in Ms White's hours had been occasioned by genuine commercial reasons.

[74] In that situation I find that a fair and reasonable employer would have consulted with the employees and have tried to minimise the impact on them.

[75] I find that (i) Mr Dempster had consulted with all of the Café employees about the changes in their working hours as confirmed by Ms Mokomoko's evidence, and (ii) Ms White had been offered 17 hours a week which was a reduction below the 20 hours that had been agreed at the outset of her employment.

[76] Ms White said that the days on which she had been offered these hours had not suited her, as they included a Saturday which she did not wish to work, although I note that she had worked one or two Saturdays at the request of Ms Mokokoko.

[77] I further note that Ms White had the opportunity to work additional hours by working the shifts offered by Ms Mokokoko, however she had elected not to do so.

[78] Nor did Ms White accept the opportunity of working the night-time shifts she had preferred when offered these by Mr Hutchins and Mr Dempster on 5 and again on 26 August 2012.

[79] I do not find that Ms Reid had been allocated hours which should have been allocated to Ms White, as Ms Reid worked only on a Saturday, which Ms White did not want to work when offered the opportunity to do so, and on shifts the other employees, including Ms White, did not wish to work.

[80] I find the opportunity existed for Ms White to have increased her hours of work by working on shifts which were offered to her; however she had chosen not to do so.

[81] I also observe that by early August 2012 Ms White had obtained additional employment at the Parahiki Childcare Centre. Whilst there is no substantive evidence that Ms White consistently turned down the offer of additional shifts and the opportunity to resume night time shifts on the basis of her work commitments at the Parahiki Childcare Centre, I do find that Ms White had the offer of additional hours which she chose to reject and it is not unreasonable to conclude that her alternative work commitments contributed to these decisions.

[82] I also observe that according to the bank statement evidence provided to the Authority by Ms White it appears that Ms White worked an average of 25-30 hours per week at the Parahiki Childcare Centre which is significantly more than the 6-8 hours she stated she had worked.

[83] Having given full consideration to these matters I find that the reduction in Ms White's working hours from July 2013 was caused by genuine commercial reasons as a result of the Café not being operational in the evenings which had impacted upon her agreed working hours.

[84] As a result, Ms White had been consulted by Mr Hutchins and Mr Dempster and offered alternative hours which if accepted, would have resulted in her having rostered hours which represented only a small shortfall on those previously worked.

[85] Due to the acceptance of additional shifts, I note that Ms White's average working hours at the Café during July 2013 were 22.45, and I find that during August and September 2013 Ms White had agreed to take annual leave and had refused additional shifts at the Café, possibly as a result of her work commitments at the Parahiki Childcare Centre, and this had resulted in a reduction in her worked hours at the Café .

[86] I determine that whilst Ms White's weekly working hours reduced after July 2013, the reduction in hours was not unjustifiable.

Was Ms White unjustifiably dismissed by Mr Hutchins and Mr Dempster on 23 September 2012?

[87] The Café had been in financial difficulties; it could not pay Mr Hutchins and Mr Dempster a salary and as a result they were incurring unpaid bills. In this situation they had decided not to renew the Café lease and Mr Hutchins had sought and obtained alternative employment.

[88] I find that Mr Dempster and Mr Hutchins had genuine and reasonable commercial reasons for deciding to close the Café.

[89] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*¹ noted that this compliance with good faith dealing includes consultation "*as the fair and reasonable employer will comply with the law*"²

[90] Both Ms Mocomoko and Ms Reid gave evidence to the effect that they had been consulted and advised that the Café would be closing, of the change in the date from 31 August to 30 September 2012, and of the impact this would have on their continued employment. They both confirmed that all the employees, including Ms White, received this information.

[91] In this context I observe that the letter dated 23 July 2012 which informed Ms White that the Café was being sold or closed by 31 August 2012 and that her position would be redundant as from that date, commences: "*As you are aware the café will be sold or close by 31 August 2013...*". This statement I find to support the evidence given by Ms Mocomoko

¹ [2006] ERNZ 825,842

² Ibid at para [40]

and Ms Reid that Mr Hutchins and Mr Dempster openly discussed the Café situation with the employees.

[92] I further note the evidence of Ms Mokokoko and Ms Reid that the employees had been kept well informed by Mr Dempster and Mr Hutchins prior to, and following this letter about the Café closure position.

[93] Ms White claims that she had not been advised by either Mr Hutchins or Mr Dempster that the closure date had been extended to 30 September 2012.

[94] Whilst I accept that there had been no formal confirmation that this was the case, I find that the evidence of Ms Mokokoko and Ms Reid unequivocally confirms that all the employees at the Café, including Ms White, were verbally informed and knew that the closure date and consequent termination of their employment by reason of redundancy had been extended to the end of September 2012.

[95] I also find that following Mr Dempster's meeting with prospective purchasers on 2 September 2013 and the subsequent discussion with Ms White and Ms Reid, Ms Reid's evidence confirms that it had been made quite clear that the Café would close at the end of September 2013.

[96] Further, had there been any confusion over the closure date at this point, it would have been open to Ms White to have queried it. However there is no evidence that she did so, either on that date or on any date subsequently; despite the evidence of Ms Mokokoko and Ms Reid that the closure was a frequent topic of discussion between the employees and Mr Dempster and Mr Hutchins.

[97] I also note that in an email sent to Mr Austin and dated 18 September 2012, Ms White confirms that she was aware that the closure date of the Café would be 30 September 2012: *"Oh I got the date wrong about the take over date, it was to be the 30th not the 20th. Sorry"*

[98] Based on the email sent to Mr Austin on the evening of 20 September 2012, I also find that Ms White had been aware that her shift on Sunday 23 September 2012 was to be her last shift at the Café and that her employment would terminate at that date.

[99] Although the closure date of the Café was extended beyond that first advised in the letter dated 23 July 2012, I find that Ms White was provided with notice of the termination of her employment and had been provided with a three week notice period which she had worked.

[100] I find that Mr Dempster and Mr Hutchinson complied with the statutory good faith dealing in what I have found to be a genuine redundancy situation.

[101] I determine that Ms White has not been unjustifiably dismissed by Mr Dempster and Mr Hutchins.

Costs

[102] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority